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IN THE

Supreme Court of the United States

OCTOBER TERM 1972

No. 72-1428

JESSE ALEXANDER ELLER, MARTHA STREET ELLER, BRENDAN EDWARD LYNCH, MARJORIE ELAINE LYNCH, KENNETH PHILLIP WHITTEMORE, BETTE ANN WHITTEMORE, ARTHUR EMANUEL DINERMAN, JANET AVIN DINERMAN, MORRIS EDWARD SAMPSON, THELMA OLINDA SAMPSON, WILLIAM RAYMOND LEER, MARGARET STREET LEER, LEO PAUL CHABOT, WANDA MAXINE CHABOT, JOHN EUGENE SPAULDING and BERNADINE LANE SPAULDING, *Intervenors*,

Petitioners,

v.

SYLVESTER J. VAUGHNS, JR., by his father and next friend, SYLVESTER J. VAUGHNS; TOIKA E. WHEATFALL, by her father and next friend, WALTER E. WHEATFALL; JAMES R. L. BROOKS, JR., by his father and next friend, JAMES R. L. BROOKS; REGINALD WIGGS, by his father and next friend, HOSEA WIGGS; REGINALD A. JACKSON, JR., by his father and next friend, REGINALD A. JACKSON; DENISE J. LIGON, by her father and next friend, DENNIS J. LIGON, JR.; CAROLYN GILMORE, by her father and next friend, STERLING GILMORE; JOHN A. WILLIAMS, by his father and next friend, JOHN J. WILLIAMS, individually and on behalf of all other persons similarly situated,

Respondents,

v.

BOARD OF EDUCATION OF PRINCE GEORGE'S COUNTY; A. JAMES GOLATO, President of the Board of Education of Prince George's County and CHESTER E. WHITING, JOANNE T. GOLDSMITH, DR. RODNEY W. JOHNSON, SUE V. MILLS, DR. J. RIGHTON ROBERTSON, JESSE J. WARR, JR., PHYLLIS E. WILLIAMS, RUTH S. WOLF, members of the Board of Education of Prince George's County; and DR. CARL W. HASSELL, Superintendent of Schools of Prince George's County,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Petitioners,

v.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION TO ADVANCE AND FOR PENDENTE LITE RELIEF

Petitioners respectfully move that the Court advance its consideration and disposition of this case. It represents issues of

national importance which require prompt resolution by this Court for the reason stated in the annexed Petition for Writ of Certiorari. It would be desirable for the issues to be decided before the beginning of the next school term in September, 1973 in order to guide the many courts and school boards now making plans for the coming years and to reduce somewhat the possible necessity for reorganization of the school systems after the 1973-74 school term is underway.

WHEREFORE Petitioners pray that the Court:

1. Advance consideration of the Petition for Writ of Certiorari and any cross petition[1] or other response thereto during the current term, or if need be during the Court's vacation or such special or extended terms as may be convenient;

2. If the Court determines to grant the petition for certiorari, arrange such procedures as will permit prompt decision on the merits as the Court may deem appropriate, including either summary disposition without argument or a special term for argument. If the Court decides to hear the argument, it is suggested that the Court consider the case on the original record without printing or alternatively to permit reproduction of the appendix record used in the Court of Appeals by other than standard typographic means. However, the appendix to the Petition for Writ of Certiorari is printed and includes part of the aforesaid record.

Petitioners seek *pendente lite* relief pending disposition of the petition for certiorari.

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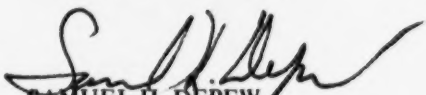
[1]Petitions believe that the Prince George's County Board of Education will file a petition for certiorari seeking review of the decision below.

(1) The Federal District Court for the District of Maryland shall stay all further proceedings until after this Court renders a decision; and

(2) The Respondent Prince George's County Board of Education shall take no steps which will tend to prejudice or change the implementation of the January 29, 1973 Order and that no amendments shall be put in force at the beginning of the next school term until after this Court has rendered its opinion.

Such an order is obviously necessary to avoid the possibility that the passage of time while the case is being reviewed here will unnecessarily prejudice the substantive rights of petitioners.

Respectfully submitted,



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April 20, 1973

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Jesse Alexander Eller, *et al.*, on behalf of themselves school-age children and other citizens of Prince George's County, Maryland, similarly situated, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case entered on January

23, 1973.[1] A previous order was entered by the Fourth Circuit on October 12, 1972.[2]

OPINIONS BELOW

The opinions of the Court below directly proceeding this petition are as follows:[3]

1. Judgment and Order of United States Court of Appeals for the Fourth Circuit Case No. 73-1023, 1024 Affirming District Court Decision, dated January 23, 1973. . . . . page 1a

2. Order of United States Court of Appeals for the Fourth Circuit Case No. 73-1023, Granting and Denying Amicus Curiae Standing, dated January 19, 1973. . . . . page 7a

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[1]The United States Court of Appeals for the Fourth Circuit has not rendered its written opinion as of the date of the printing of this petition for writ of certiorari. By letter of March 20, 1973, the Honorable Chief Judge Clement F. Haynsworth, Jr., writing to Paul M. Nussbaum, attorney for the Prince George's County Board of Education stated:

> "I do intend, to file a written opinion in the Prince George's County case. It would have been filed long since if I had not come down with the flu and suffered a subsequent relapse. I cannot tell you exactly when it will be filed, for any opinion can provoke somewhat extensive discussion, special concurrences and so forth. I hope it will not be long delayed, but I suggest that it would be expedient for you to plan now to file your petition to the Supreme Court without it, filing copies of the opinion itself as a later supplement."

[2]This case has been before this Court once before, as Case No. 72-799-CFX. On November 30, 1972, petitioners petitioned the Court for a Writ of Certiorari based upon the District Court Order dated July 25, 1972 and August 21, 1972. The Court of Appeals for the Fourth Circuit held the issues not to be ripe for review on October 12, 1972. Respondents replied in this Court on January 2, 1973. Said petition was denied by this Court on January 22, 1973.

[3]The appendices include all opinions below and are printed in the second volume because of size. Reference is denoted page 1a through page 109a.

3. Order of United States Court of Appeals for the Fourth Circuit Case No. 73-1023, 1024, Postponing Stay, dated January 10, 1973. . . . . page 9a

4. Order of United States District Court for the District of Maryland, Civil No. 72-325-K, dated December 29, 1972, Implementing Student Transfers and Busing Plan. . . page 11a

5. Court Memorandum of United States District Court for the District of Maryland, Civil No. 72-375-K, dated December 13, 1972, Implementing Order. . . . . page 33a

6. Order of United States Court of Appeals for the Fourth Circuit, Case No. 72-2129, 2130, 2131, dated October 12, 1972, Interlocutory Appeal. . . . . page 46a

7. Order of United States District Court for the District of Maryland, Civil No. 72-325-K, dated August 31, 1972 Implementing Order. . . . . page 52a

8. Order of United States District Court for the District of Maryland, Civil No. 72-325-K, dated July 25, 1972, Granting Plaintiff's Motion for Summary Judgment. . . . . page 64a

9. Court Opinion and Order of United States District Court for District of Maryland, Civil No. 72-325-K, dated July 25, 1972, Holding *Sub Curia* all Issues. . . . . page 65a

10. Order of United States District Court for the District of Maryland, Civil No. 72-325-K, dated September 19, 1972, Granting Petitioner's Motion to Intervene. . . . . page 72a

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on January 23, 1973 (pages 1a-2a). Jurisdiction of this Court is invoked under Article III, Section II of the Constitution of the United States and 28 USC 1245 (1) and Public Law 92-318 Title VIII § § 803, 804, 806. Also, jurisdiction is invoked because of diversity of Federal

Appellate Court decisions on the issue of class action intervention in school desegregation suits.

FEDERAL QUESTIONS PRESENTED

1. Was it intended by this Court that the results of *Brown I*, *Brown II* and *Swann* would deny to Anglo-Americans as a class the right to be represented within the Federal Court process in accordance with due process of law, both substantive and procedural?
2. Was it intended by this Court that *Brown II* and *Swann* would establish that racial ratios would be the sole standard for determining school desegregation to achieve a unified school system?
3. Can a Federal District Court rule in contradistinction and overturn a decision of the Maryland Court of Appeals, which held that within a county school system, *de jure* segregation did not exist and the system was in compliance with *Swann* because *de facto* segregation was shown to prevail?
4. Can the Federal District Court refuse to construe and/or decide the constitutionality of Title VIII of Public Law No. 92-318 §803, §804, §805and §806 of the Higher Education Act Amendment of 1972 passed by Congress to legislate county school desegregation plans and a busing moratorium?

CONSTITUTIONAL PROVISIONS & STATUTES INVOLVED

Amendment V, Constitution of the United States -

> "No person shall be *** deprived of life, liberty, of property, without due process of law****"

Title 20, United States Code, Section 1232a -

> "No provision of the Act of September 30, 1950, Public Law 874, Eighty-First Congress; the

National Defense Education Act of 1958; the Act of September 23, 1950, Public Law 815, Eighty-First Congress; the Higher Education Facilities Act of 1963; the Elementary and Secondary Education Act of 1965; the Higher Education Act of 1965; the International Education Act of 1966; or the Vocational Education Act of 1963 shall be construed to authorize any department agency, officer, or employee of the United States to exercise any direction, supervision, or control over *** any educational institution or school system, or to require the assignment or transportation of students or teachers in order to overcome racial imbalance."

Title 42, United States Code, Section 2000c(b) -

" 'Desegregation' means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance."

P.L. 92-318 (LAWS OF 92nd CONG. -2nd SESS. June 23, 1972)

TITLE VIII–GENERAL PROVISIONS RELATING TO THE ASSIGNMENT OR TRANSPORTATION OF STUDENTS

PROHIBITION AGAINST ASSIGNMENT OR TRANSPORTATION OF STUDENTS TO OVERCOME RACIAL IMBALANCE

PROVISION RELATING TO COURT APPEALS

Section 803. Notwithstanding any other law or provision of law, in the case of any order on the part of any United States district court which requires the transfer or transportation of any student or students from any school attendance area prescribed by competent State or local authority for the purposes of achieving a balance among students with respect to race, sex, religion, or socioeconomic status, the effectiveness of

such order shall be postponed until all appeals in connection with such order have been exhausted or, in the event no appeals are taken, until the time for such appeals has expired. This section shall expire at midnight on January 1, 1974.

PROVISION AUTHORIZING INTERVENTION IN COURT ORDERS

Section 804. A parent or guardian of a child, or parents or guardians of children similarly situated, transported to a public school in accordance with a court order, may seek to reopen or intervene in the further implementation of such court order, currently in effect, if the time or distance of travel is so great as to risk the health of the student or significantly impinge on his or her educational process.

PROVISION REQUIRING THAT RULES OF EVIDENCE BE UNIFORM

Section 805. The rules of evidence required to prove that State or local authorities are practicing racial discrimination in assigning students to public schools shall be uniform throughout the United States.

APPLICATION OF PROVISO OF SECTION 407(a) OF THE CIVIL RIGHTS ACT OF 1964 TO THE ENTIRE UNITED STATES

Section 806. The proviso of section 407(a) of the Civil Rights Act of 1964 providing in substance that no court or official of the United States shall be empowered to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards shall apply to all public school pupils and to every public school system, public school and public school board, as defined by Title IV, under all circumstances and conditions and at all times in every State, district, territory, Commonwealth, or possession of the United States regardless of whether the

residence of such public school pupils or the principal offices of such public school system, public school or public school board is situated in the northern, eastern, western, or southern part of the United States.

STATEMENT UNDER RULE 33(2)(b)

This proceeding draws into question the constitutionality of Public Law No. 92-318, Title VIII § § 803, 804, 805, 806, 86 Stat. 235, all as amended, which are acts of Congress affecting the public interest, and neither the United States, nor any agency, officer of employee thereof is a party, therefore it is noted that 28 USC §2403 may be applicable.

STATEMENT OF THE CASE

This petition seeks review of a decision of the Court of Appeals (Exhibit A, p. 1a-6a) that refused to consider the substantive issues raised by petitioners in challenging the lower Court's orders of July 25, 1972 (Exhibit H, p. 64a and Exhibit I, p. 65a-71a) and December 29, 1972, (Exhibit D, p. 11a-32a) wherein it concluded that unlawful segregation existed in the Prince George's County school system and a "Staff Plan" would be implemented. While the Court of Appeals (Exhibit F, p. 46a) recognized petitioner's challenge of the orders, it nevertheless avoided responding to the merits of your Petitioner's contentions and instead dealt solely with the issue of whether or not the lower Court's July 29, 1972 order, regarding the submission of plans for "desegregation," was ripe for judicial review (p. 50a). Finding that it was not ripe on the July 29, 1972 Order, the Appeliate Court below remanded the full proceeding to the District Court (p. 51a). On the District Court Order of December 29, 1972 (p. 11a) the Court of Appeals affirmed the lower Court by mandate of January 23, 1973 (p. 1a, 2a). It is from both of the Appellate mandates dated January 23, 1973 and October 12, 1972 (p. 1a, 2a, 51a) that petitioners ask this Court for certiorari.

Plaintiffs, Black citizens of Prince George's County, Maryland, filed a complaint alleging that the school system of Prince George's County did not meet constitutional standards

and thus deprived them, and citizens similarly situated, of the equal protection of the laws of this nation. The thrust of plaintiffs' complaint was that vestiges of the pre-*Brown I* dual school system had not been dismantled. To expedite consideration of their complaint, plaintiffs and defendants filed with the District Court a Joint Stipulation of Facts, which set forth, *inter alia,* certain statistical data pertaining to the racial composition of the schools within defendants' system. The Joint Stipulation also included, in two places, a letter dated April 3, 1969, from HEW to the Superintendent of Schools submitting certain proposals and suggestions for desegregation of the County's schools. However, the parties did not place into the Joint Stipulation the subsequent fact that on November 19, 1969, H.E.W. found that the school system was in full compliance with Title VI of the Civil Rights Act of 1964.

Based solely on the content of the Joint Stipulation of Facts, (which was actually incomplete) the District Court granted Black plaintiffs' motion for summary judgment on July 25, 1972 (p. 64a). The Court found that there was a lack of desegregation in the schools that, " ...stems from a pre-*Brown I* segregated system which has never been effectively dismantled... " (p. 69a). Thereupon, the Court ordered the school Board to submit to it a desegregation plan that would conform to the constitutional criteria established by this Court in its *Brown I,*[4] *Brown II,*[5] and *Swann*[6] decisions.[7] The School Board, on a four-to-four vote refused to adopt a massive busing plan presented to it by its staff and instead submitted a report to the Court on its endeavors to comply with the Court's mandate (p. 31a).

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[4]*Brown v. Board of Education,* 347 U.S. 438, 74 S.Ct.686, 98 L.Ed.873 (1954).

[5]*Brown v. Board of Education,* 349 U.S. 294, 75 S.Ct.753, 99 L.Ed.1083 (1955).

[6]*Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 91 S.Ct.1267, 28 L.Ed.2d 554 (1971).

[7]That decision conflicts with the State Court's ruling that *de facto,* not *de jure,* segregation prevailed in the Prince George's County school system, since adoption by the School Board on November 11, 1969, of the desegregation plan which is presently in effect, *Eugene Borders, et al. v. Board of Education of Prince George's County, et al.,* 265 Md. 448, 290 A.2d 510 (1972).

Thereafter petitioners filed their Motion to Intervene on August 23, 1972, (Exhibit K, p. 75-a77a) but the Court would not hear petitioners' motion until September 8, 1972, thereby limiting the rights of intervenors and only effective as of September 1, 1972, (p. 72a-74a) which was after the July 25, 1972 order. The Court specifically prohibited and then continued to prohibit petitioners from participating in the hearings following petitioner's filing of its Motion to Intervene on August 23, 1972. Petitioners were excluded from court hearings held on August 25, 28, 29, 30, 31, 1972, yet the transcript show petitioners' counsel to be present. Petitioners were not allowed to present evidence or to develop fully an evidentiary record, introduce expert evidence, use direct and cross-examination of witnesses and otherwise present evidence on the basic issue of the school system's compliance or noncompliance with constitutional standards. Further hearings were held on November 2, December 7, 13, 26, 1972 attended by petitioners' counsel, but the Court below would not permit counsel to properly represent his clients during the proceedings. The Court's ruling on basic issues was without benefit of certain relevant facts, and the District Court would not permit the taking of evidence in explanation of facts set forth in the Joint Stipulation - evidence that was crucial to a determination of causation of any racial imbalance and, therefore, bearing directly upon the *de jure - de facto* issue.[8] The desegregation plan in effect on July 25, 1972 was instituted on November 11, 1969 and remained in effect until January 29, 1973; and was judicially determined to be constitutional and had suffered no change through legislation, state, county, or otherwise.[9] (see pages 33-37, *Infra*)

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[8]For Example, the fact that the Department of Health, Education and Welfare (H.E.W.) had ruled on November 19, 1969, that the school system of Prince George's County had met the requirements of Title VI of the Civil Rights Act of 1964 through its plans submitted for the desegregation of all elementary schools, of all secondary schools, and of the professional staffs of these schools was not presented to the Court.

[9]The Maryland Court of Appeals concluded that *de jure* segregation did not exist in the Prince George's County school system. *Borders et al. v. Board of Education of Prince George's County, et al.*, footnote 7, *supra*, page 8 . (1972)

The U.S. Court of Appeals for the Fourth Circuit in its decision in this instant case, ignored Petitioner's request to review the July 25, 1972 Order, or in the alternate, to require the record to be reopened on remand to permit petitioners and others to introduce into evidence relevant and pertinent factual data on the *de facto - de jure* issue. Petitioners preserved their objections on the record specifically for appellate review.[10]

This preservation of the record (Footnote 10) herein is a significant contribution made by petitioner's counsel speaking on the record before Judge Kaufman. The use of in-chamber's proceedings was extensive and lacked court proceeding transcripts in derogation of the rights of all of the citizens of Prince George's County and most specifically those Anglo-Americans represented by Mr. Emmett H. Nanna, Jr. as petitioner-intervenors' counsel. In-chambers proceedings when permitted by a Federal district court having jurisdiction over school desegregation suits, should require the presence of a court reporter for preservation of *all* of the record.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

This case merits review on certiorari because it involves important legal questions which have been raised within the Federal Court System. The Lower Courts in implementing *Brown I, Brown II*, and more recently *Swann*, (Footnotes 4, 5, 6, 7, p. 8, *supra*), have exceeded the constitutional limits and petitioners, as Anglo-Americans designated as a class, now challenge *Brown II* and *Swann* and request this Court to hear on

[10]Mr. Nanna: First, Your Honor, I want to thank you for the opportunity you extended to me to participate in the discussion in Chambers where the staff plan was reviewed by the Court and by all counsel in this case. We do not endorse the final staff plan as being educationally sound, and we adopt the view taken by the Board in that matter, and * * * we do not agree that the implementation of the plan is necessary to bring the Prince George's County school system into compliance with the standards set out in *Brown* and *Swann*. But we have no objection to the admissibility of the plan. (Transcript of preceedingsbefore Judge Frank A. Kaufman on December 26, 1972 at page 18; Civil Case No. 72-325 K)

the merits and determine following oral arguments that substantive and procedural due process no longer exist for aggrieved school children and their parents. The major questions presented are due process in formulating specific desegregation goals through Black-White ratios and busing to achieve said goals, and the proper standard for Federal Appellate review of the methods used in achieving a unified school system. Federal courts throughout the country have issued decisions inconsistent among themselves and in violation of the United States Constitution. Unreported in-chambers proceedings should not be acceptable under due process, unless said proceedings are placed on the record at a later time in open court. The public citizenry has a constitutional right to know.

In addition to these clear legal issues, the case should be reviewed because the ultimate decision in this case will have enormous practical impact on the future of public school desegregation. The majority of citizens in the United States are Anglo-Americans, and it is time that they have adequate legal representation in all school desegregation cases.

I

THE FEDERAL DISTRICT COURT AND THE COURT OF APPEALS ERRED IN INTERPRETING THIS COURT'S HOLDINGS IN *BROWN I, BROWN II* AND *SWANN* THEREBY DENYING TO ANGLO-AMERICANS AS A CLASS THE RIGHT TO BE REPRESENTED WITHIN THE FEDERAL COURT SYSTEM IN ACCORDANCE WITH DUE PROCESS OF LAW, BOTH SUBSTANTIVE AND PROCEDURAL.

Petitioners filed its Motion to Intervene in this proceeding to protect their rights and contest the Court's *premature* findings of unlawful segregation. Petitioners had theretofore expected that counsel for the School Board would contest that *premature* finding, however, the School Board failed to object to the summary judgment order. Anglo-Americans realizing as a class that they were not represented, filed the Motion to Intervene immediately.

The court recognized petitioners' standing to intervene and no formal response in opposition to the Motion was filed by any party. However, in its order permitting intervention, the Court restricted petitioners' right in presenting evidence on the *de jure - de facto* issue:

> ***unless this Court's order of July 25, 1972, is reversed in whole or in part by the United States Court of Appeals for the Fourth Circuit, the intervenors shall not seek to present to this Court any evidence, testimonial or documentary, other than that which was presented to this Court by joint stipulation of the parties prior to July 25, 1972, and made a matter of record herein, relating to the issue of compliance or non-compliance with the standards of *Brown I, Brown II,* and *Swann* **** (p. 73a)

The Court Order of September 19, 1972, permitting intervention was issued 27 days after the Motion to Intervene was filed, said motion containing allegations of relevant facts. The Court permitted intervention by back-dating 19 days to be effective as of September 1, 1972. A copy of that motion (p. 75a) along with a Memorandum of Law (Exhibit L, (p. 78a) submitted to the Court in support of the motion, upon direction of the Court is included in the appendix. Further, petitioners on September 7, 1972, 8 days following the Court's Order of August 31, 1972 (Exhibit G, p. 52a), filed a "Motion for New Trial, Motion to Reopen the Record, etc." again asserting the necessity to reopen the record for further relevant evidence bearing on the constitutional issue involved in this proceeding. The Court accepted the aforesaid motion as an *amicus curiae* (p. 73a) filing as of September 8, 1972 and afforded it no other status; nothing resulted from this filing, notwithstanding that the Board of Education was to file its court-ordered desegregation plan by December 4, 1972, allowing ample time for your petitioners to correct the record by due process of law.

ARGUMENT

Anglo-Americans as a class are entitled to full class action standing in a school desegregation case. At issue is (1) the right

to intervene, (2) the timeliness of the intervention, (3) notice under due process of law to all interested parties and (4) the proper in-court proceedings for preservation of the record for appellate use.

Mr. Justice Powell in speaking for the Court in *San Antonio Independent School District et al.* v. *Rodriquez et al,* ____U.S.____, ___ S.Ct. _____, _____ L.Ed.2d _____ (1973) (Slip Opinion No. 71-1332 decided March 21, 1973) stated:

> "In *Brown v. Board of Education*, 347 U.S. 483 (1954), a unanimous Court recognized that education is perhaps the most important functions of state and local governments" (at 20)
>
> "Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected." (at 30)

Thus *since this Court has found that education is not explicitly or implicitly protected under our Federal Constitution,* it is time that the Court review *Brown II* and *Swann* in light of the issues raised by the case at bar, to determine the constitutionality of the Federal District Court's decision of July 25, 1972 (p. 1a-2a).

CLASS-ACTION STATUS OF PETITIONERS

Jesse Alexander Eller, et al., as plaintiff intervenors in the instant case did not file in the case caption the term "on behalf of their infant children." Further, the phrase "on behalf of themselves and other like them similarily situated" was not placed in the caption or in the preamble to the pleadings (Motion) filed (p. 75a). Nonetheless petitioners filed as intervenors to protect the interests of their children and other like them similarily situated and this was stated in the original Motion to Intervene.

> "That your petitioners are Non-Black adult citizens of the United States of America, Prince George's County, and tax payers, having school age children in the public schools of Prince George's County, who also represent a class under Federal Rule 23" (p. 76a).

Petitioners maintain that the Honorable Frank A. Kaufman, United States District Judge, waived any technical deficiency in the pleadings when he issued an Order granting partial intervention to your petitioners (p. 72a). Such is within the discretion of the United States District Court. Circuit Judge John R. Brown in *Potts, et al. v. Flax et al.* (C.A.5th Cir, 1963) 313 F.2d 284 stated at 288,

> "In short, the Board requested the Court to do as it ultimately did - determine propriety of a class suit on what the total record revealed, not upon the conclusory declarations (pleaded or oral) of the litigants,"

Petitioners believe and represent to this Court, that they have standing in the case at bar and do represent not only Non-Black adult citizens of Prince George's County, but also the school age children of these Non-Black adults. Opposing parties to your petitioners have not raised this technical point at any of the proceedings in the U.S. District Court or the U.S. Court of Appeals for the Fourth Circuit (Cases No. 73-1023, 73-1024, unreported) or the previous case in the Supreme Court of the United States No. 72-799 - CFX filed November 30, 1972 with certiorari denied on January 22, 1973, unreported.

Petitioners have been denied due process of law and are suffering irreparable harm unless the case at bar is remanded with directions to permit petitioners to fully participate in *all* phases of the proceeding including the reopening of the record on the *de facto - de jure* issue so as to allow the introduction into evidence of H.E.W.'s compliance report and other relevant and pertinent factual data, including but not limited to, the shifting housing patterns and other causes that have resulted in changing the racial make-up of the schools since 1969 in Prince George's County. Such housing impact within the county, *inter*

alia, has been occasioned by the ITT-Levitt Housing Developers during the 1960's as well as the immigration of Blacks from D.C. into the D.C. border communities of Prince George's County.

The Federal Rules of Civil Procedure under Rule 23 define *class actions.* Petitioners' in their Motion To Intervene in the original action (Civil No. 72-325-K, *Vaughns et al.* v *Board of Education of Prince George's County et al.* filed on March 29, 1972) cited Rule 23. (p. 76a)

Petitioners meet the requirements for bringing a class suit, said class being designated as Anglo-American. Also it should be considered that said class includes all races *other-than-Black* who were all *excluded* from the plaintiff group or class by Judge Kaufman's Order and Opinion, dated July 25, 1972, in which the Court said,

> "Plaintiffs, Black adult residents of Prince George's County, Maryland, instituted this proceeding on behalf of their school age children and other children similarly situated ****, this Court hereby determines that this action shall be maintained as a class action on behalf of all Black children of school age residing within Prince George's County" (p. 65a-66a).

Within the Court's Order it stated that the class action represented 22.4% of a total school enrollment of 162,828 pupils who are Black (p. 67a). What did the Court do to protect the rights and interests of the Anglo-American Intervenors which totaled 77.6%? No publication of notice was made.

The requirements for being a party to a class action suit are well enunciated in *Fujishima et al v. Board of Education, et al,* (C.A. 7th Cir. 1972), 400 F.2d 1355 at 1360.

> "Here the requirements of Rule 23(a) are satisfied because the number of Chicago High School students makes joinder impracticable, the question of law is common to the class, the claims of plaintiffs are typical of the class and plaintiffs have fairly and adequately protected the interests of the class. The action may be maintained under Rule 23(b)(2), which was intended to cover civil rights cases."

In *Fujishima* the 7th Circuit Appellate Court reversed the Lower District Court's order denying class status to the students, who were designated as a class but not designated as either Black or Anglo-American. Further the Appellate Court on remand stated the District Court should order defendants to give notice of the final order to all class members under Rule 23(d)(2).

Petitioners' Eller et al. meet the Rule 23 and *Fujishima* test.

This Court in *Tijerina et al* v. *Henry et al,* 398 U.S. 922, (1970) dismissed the expedited appeal from the District Court of New Mexico, "because the class was 'too vague to be meaningful' ", said District Court having dismissed the Class Action complaint on the basis that plaintiffs designated their class as *Indo-Hispano*. Mr. Justice Douglas in his dissent took issue stating that Rule 23 of F.R.C.P. does not define a class other than by stating that the class must be "so numerous that joinder of all members is impracticable" and that there must be a "question of law or fact common to the class." **** In addition, however, Federal Courts have required that "the members of a class must be capable of definite identification as being either in or out of it." (at 923). See *Tijerina et al v. Henry et al* (D.C.D.N.M. 1969) 48 F.R.D. 274.

Petitioners in the case at bar believe that the term "Anglo" and "White" represents many mixtures of races, ethnic and religious backgrounds and that as a class they have certain property rights in the educational system of the county and state wherein they pay taxes and are entitled to be known as *Anglo-Americans.*

PROPER NOTICE

Petitioners maintain that they have and had a Constitutional right to receive notice by publication, not under Rule 23 but as *affected parties,* as *parties at interests,* as *indispensable parties* to the original law suit.

When a school desegregation suit is filed, all Federal District Courts should be required to give notice by publication to all Anglo-Americans within the school system and sufficient time should be allowed for Anglo-Americans to properly enter the case having secured counsel of their own choosing. Boards

of Education have notoriously been known *not* to represent the Anglo-American class, such as in the instant case, and petitioners respectfully request this Court to take *judicial notice* of such *representative* failure.

Where there is a failure or want of proper parties before a Federal District Court, said Court *must* provide for proper representation of those in absentia. Where absence is occasioned only by failure to have knowledge of the pending suit, the Court is required in the interest of justice to provide notice. Notice is an integral part of due process in a class action, and must be reasonably calculated under the circumstances, to apprise interested parties of pendency of action and afford them an opportunity to present their objections. *Eisen et al. v. Carlisle and Jacquelin, et al.* (C.A. 2nd Cir. 1968) 391 F.2d 555, on remand, 50 F.R.D. 471.

In *Eisen* an action brought by an odd-lot investor against two brokerage firms, the Court held that an evidentiary hearing should be held to determine the extent of class action involved and the proper manner for notice, i.e. by direct mailing or publication.

Notice is required as a matter of due process in all representative actions. Federal Rule of Civil Procedure, Rule 23, requires a particularized form of notice in certain class actions which is not *only* limited to "mandatory" notice under the rule, but where required in the interest of justice, as discresionary notice.

> "While the Supreme Court has recognized that class actions represent an exception to the general rule under which only parties are bound by a judgment, the procedure adopted must conform to the requirements of due process and fairly insure the protection of absent parties who are to be bound. *Hansberry v. Lee*, 311 U.S. 32, 42, 61 S.Ct. 115, 85 L.Ed.22 (1940). Notice as an integral part of due process must be 'reasonably circulated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70

> S.Ct.652, 567, 94 L.Ed. 865 (1950). 'The Advisory Committee in its note has suggested that the mandatory notice pursuant to Rule 23(c)(2) and the discretionary notice under Rule 23(d)(2) were intended to fulfill the requirements of due process under *Hansberry* and *Mullane*. Advisory Note at 107.' " (*Eisen* at 568)

Judge Kaufman wrote in his opinion in the case at bar that,

> "Plaintiffs (Black) ask this Court to permit this case to be brought as a class action under Federal Civil Rule 23. Since this action falls precisely within the provisions of Federal Civil Rule 23(b)(2), this Court herein determines that this action should be maintained as a class action on behalf of all Black children of school age residing within Prince George's County.[11]" (p. 65a-66a)

Judge Kaufman in writing this opinion is saying that no notice is required to the class representative of all Black children of school age residing within Prince George's County, and therein specifically ignores the Anglo-American class.

The instant school desegregation case arrives at issue without any representation for the Anglo-American class because of no notice. Petitioners maintain that this violates procedural due process. Petitioners then find that their timely intervention permitted the District Court to place stringent limitations upon said intervention which is grossly unfair (p. 72a). The Court required petitioners to waive their grievances in August and September 1972 because of written self-serving statements by the Court in its order for example:

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[11] Because the class is designated pursuant to Rule 23(b)(2), no notice is required by Rule 23(c)(2), according to the District Court. (See Footnote 1, page 66a)

> "1. Intervenors are satisfied with the limited rights accorded to their counsel during the proceedings which took place in this Court from the time of the filing of the Motion to Intervene and the time of the filing of this Court's opinion on August 31, 1972." (p. 72a)
>
> "6. Counsel for the parties have orally informed this Court that the within Order, and each and every one of its terms and provisions, is fully and completely acceptable to them and to their respective clients." (p. 74a)

This is not representation of parties in interests, is not due process, either procedural or substantive, and in effect, is the dictates of a Federal government other than democratic and should not be condoned nor continenced by any Court. The United States Constitution is designed to protect all citizens. Can it be said that Anglo-Americans as a class are not protected! *The majority in this country have just as much right to be protected as any minority* under the Constitution of these United States. Before this Court thinks that petitioners have exceeded their argumentative bounds, it should be remembered that previous court decisions provide guidance within the entire Federal System and have been tragically inadequate. Such inadequacy cannot and should not be laid at the door step of any particular individual, group or court struggling with *Brown II* and *Swann* as criteria. Judge Kaufman's rulings and grounds thereof are meager enough where the Federal Courts insist on continuing to legislate state school systems. With this in mind petitioners ask this Court to look carefully at petitioners argument on intervenor's rights, *infra.* pp. 20-26 regarding the lower Federal District Court decisions *excluding* Anglo-Americans as a class for which this Court has *never* heard an oral argument.

The purpose of a class action is to enable the Court to determine fairly the rights of a numerous class of individuals by one common final judgment. *Farmers Co-Op Oil Company v. Socony-Vacuum Oil Co.* (D.C. Ill. 1942), 43 F.Supp. 735, modified on other grounds 133 F.2d 101.

INTERVENTION

Anglo-Americans have a right to intervene in school desegregation cases if such intervention is timely and notice has been properly given to said class.[12] Petitioners in their Motion to Intervene cited F.R.C.P. Rule 24(a)(2) as authority (p. 77a). This Court needs to follow its previous holding in *Trbovich.*

Certiorari was granted by this Court to determine whether the LMRDA imposed a bar to intervention by union members under F.R.C.P. Rule 24 in a suit initiated by the Secretary of Labor, *Trbovich v. U.M.W.A. et al.* 404 U.S. ____, 92 S.Ct. 202, 30 L.Ed2d 160 (1971).

In *Trbovich v. U.M.W.A. et al.* ____US____, 92 S.Ct. 630, ____ L.Ed.2d ____, (1972) this Court held under the LMRDA and Rule 24, that the Secretary of Labor by statute had the duty to serve two distinct interests, which are related, but not identical. First, the statute gives the individual union members certain rights against their union, and "The Secretary of Labor in effect becomes the union member's lawyer" for purposes of enforcing those rights. **** And second, the Secretary has an obligation to protect the "vital public interest in assuring free and democratic union elections that transcend the narrow interest of the complaining union member" **** Both functions are important, and they may not always dictate precisely the same approach to the conduct of the litigation. Even if the Secretary is performing his duties, broadly conceived, as well as can be expected, the union member may have a valid complaint about the performance of "his lawyer".

By analogy, the Prince George's County Board of Education is a governmental unit, just as the Secretary of Labor is. Where the school board's attorney fails to do those things in representing all Anglo-American students and their parents as a class, the Anglo-American representative group has a right to enforce a valid complaint regarding the performance of "his lawyer," just

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[12] See *Intervention: Moore v. Levi,* Federal Intervention, 45 Yale L.J. 565, 47 Yale L.J. 898 (1936); *Multiparty Litigation in Federal Courts,* 71 Harv.L.Rev. 874, 897-906, 988-992; (1958), *Intervention Before Courts,* 81 Harv.L.Rev. 721, 726-726 (1968).

as *Trbovich* complained about the Secretary of Labor. The fact that there is a similar school desegregation statute (28 Stat. 235), providing rights to aggrieved Anglo-Americans such as is granted to union members under the LMRDA, should be significant in analyzing your petitioners' constitutional rights of adequate representation.[13] Your petitioner requests this Court to grant the same privilege of certiorari as was done for *Trbovich.* Briefs on the merits and oral argument can determine those requirements necessary for intervenors to qualify under the federal rules and law in all school desegregation cases from this time forward.

Many decisions at the United States District Court level have addressed the rights of Anglo-Americans to intervene in school desegregation cases. Notwithstanding diverse decisions in the United States Supreme Court has *never* granted certiorari, (perhaps because the issue was never properly raised in this Court), to determine the intervenor issue of an Anglo-American class action, or to settle the differences in Federal court decisions on intervention. Examples of such rulings are:

a. The Federal District Court in Florida states Anglo-Americans have no intervenor rights. *Agustus et al. v. School Board of Escambia, et al.,* (D. C. N.D. Fla. 1969) 299 F.Supp.1067, in which the Court held that an intervenor class of White and Negro students had no standing as interested or affected parties.

The motion to intervene was denied and the Court dismissed the petition. Citing at 1069, District Judge Arnow said,

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[13]Public Law 92-318, Title VIII, Sec. 804 passed June 23, 1972 reads: "A parent or guardian of a child, or parents or guardians of children similarly situated, transported to a public school in accordance with a court order, may seek to reopen or interfere in the further implementation of such court order, currently in effect, if the time or distance of travel is so great as to risk the health of the student or significantly impinge on his or her educational process." Also see §§803, 805, 806 of Title VII; the District Court Order of December 29, 1972 (page 11a) has timely placed those Anglo-American pupils, represented by your petitioners, squarely within this Act of Congress.

> "The pleading here presented in effect contains nothing but legal arguments delineating movant's contentions respecting the law. Such have been carefully considered; each contention advanced has, in the judgment of this Court, been determined adversely to movants by decisions of the United States Court of Appeals for the Fifth Circuit or the Supreme Court of the United States. In final analysis, movants seek permission to ask this Court to do something it is powerless to do, even were it so inclined, and that is enter ruling that these decisions are erroneous. For that reason, alone, intervention must be denied and dismissed."

BUT IF THIS STATEMENT OF JUDGE ARNOW BE TRUE, why is there no single legal citation in his quote? Why upon diligent search of the law cannot the petitioners in the instant case find any U.S. Supreme Court case to support the District Judge's statements? Petitioners submit that the above is advanced under *Color of Law*.

b. (1) "The Fifth Circuit Court of Appeals has squarely held 'intervention in school cases is not a matter of right' * * *"[14] *Moore, et al. v. Tangipahoa Parish School Board, et al.* (D.C.E.D.La. 1969) 298 F.Supp. 288; also *Moore* (D.C.E.D. La. 1969) 298 F.Supp. 286; and *Moore* (D.C.E.D.La. 1968) 298 F.Supp. 285.

District Judge Rubin, speaking in *Moore* (at 290) addressed the issue of intervention of two groups of white children and their parents, who contended that the school board did not adequately represent the interests of the white school children. Considering that this opinion was written in 1969, it would appear to bring forth all intervention law up to that time. But legal students of intervention in school desegregation cases must be careful for they may sleep on the law that is improperly quoted. In *Moore* at 292, one would believe that the

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[14] *Stell v. Savannah – Chatham County Board of Education,* (C.A.5th Cir. 1964) 333 F.2d 55, 60.

Green citation[15] would embody a U.S. Supreme Court holding on intervention. But such is *not* the case because a diligent review of *Green*, 391 U.S. 430, *et. seq.* will disclose *no* issue before the Court on intervenor rights.

The only other case cited in *Moore* is *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 87 S.Ct. 932, 17 L.Ed. 2d 814 (1967), to which Judge Rubin disposed of summarily. The Court in *Moore* at 292 denied the motions to intervene as a matter of right under Rule 24(a).

However, in *Moore*, the Court did permit "permissive intervention by the white students and parents as a class," but subject to certain conditions (at 293). In the instant case it was as though District Judge Kaufman read these limitations and modeled the lower Courts opinion accordingly (page 72a), notwithstanding petitioner's Motion to Intervene under Rule 24(a) (page 75a).

(b)(2) In *United States v. Carroll County Board of Education et al. v. Woodson, et al.* (C.A. 5th Cir. 1970), 427 F.2d 141, the Court of Appeals held that intervenors had no right to intervene under Rule 24(a). Intervenors were Black students and parents and waited five (5) years before seeking to intervene. Representation for them as a class had been afforded by the United States Attorney General. The Court gave *no* citations in this decision. *Woodson* is distinguishable from the case at bar because your petitioners entered the lower Court case as soon as it became known that a school desegregation case was at issue, not five years later.

c. The Federal District Court in New York stated Anglo-Americans have no intervenor rights. In *Blocker et al. v. Board of Education of Manhasset, New York, et al.*, (D.C.E.D.N.Y. 1964) 229 F.Supp. 714, the Court denied Anglo-American's motion to intervene as of right pursuant to Rule 24(a)(2). *No* U.S. Supreme Court cases covering intervenor's rights under school desegregation analysis were cited. Instead the Court relied solely on *Sam Fox Publishing Co. v. United States*, 366 U.S. 683, 694, 81 S.Ct. 1309, 1315, 6 L.Ed.2d 604 (1961),

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[15] *Green v. County School Board of New Kent County, Va.* 391 U.S. 430, 88 S.Ct.1689, 20 L.Ed.2d 716 (1968).

> "In its most recent decision on this subject, the Supreme Court has made it clear that a proposed intervenor must show that he is or may be *legally bound* before he may intervene as of right **** This the proposed intervenors have not shown. **** these intervenors allege that the Court's opinion will subject them to higher taxes. Even if this were so, it can hardly be contended that the applicants would thus be "legally bound" under the Supreme Court's mandate in *Sam Fox Publishing Co.* v. *United States, supra.*" (at 716)

This Court held in *Sam Fox,*

> "We regard it as fully settled that a person whose private interests coincide with the public interest in government anti-trust litigation is nonetheless not bound by the eventuality of such litigation, and hence may not, as of right, intervene in it." (366 U.S. at 689)

Can this Court – the United States Supreme Court – sanction the legal analysis of the *Sam Fox* case involving anti-trust litigation by the U.S. Government with intervenor's rights in school desegregation cases? Petitioner's wish to argue on the *merits* that the cloak of the Federal Courts has been thrown over the Anglo-American class, as a majority class, under the *color of law* and that this cloak has been and is continuing to deprive all Anglo-Americans of constitutional due process of law.

d. The Federal District Court in Oklahoma held that Anglo-Americans had no right to intervene. *Dowell v. Board of Education of Oklahoma City Public Schools, et al.* (D.C. W.D.Okla. 1970) 307 F.Supp. 583, 593. Denial of Intervenor's Motion was based upon a filing date of December 3, 1969, whereas a previous *Dowell* case had been in litigation since 1963 and decided by this Court. *Dowell v. Board of Education of Oklahoma City Public Schools,* 396 U.S. 269, 90 S.Ct. 415, 24 L.Ed.2d 414 (1969). *Dowell* is certainly distinguishable from the case at bar, because, *inter alia,* of the late time of filing.

e. The Ninth Circuit Court of Appeals has affirmed a California Federal District Court's decision denying intervention as a matter of right. In *Spangler et al. v. Pasadena City Board of Education, et al.* (C.A. 9th Cir. 1970) 427 F.2d 1352, where the school board did not appeal, parents of school children dissatisfied with a desegregation decree and a decision of the school board, which acquiesced in the decree and adopted a desegregation plan, had no right to intervene to file an appeal from the decree, to which they had not previously been party litigants.

f. The Court of Appeals for the District of Columbia in *Smuck v. Hobson et al.*, 132 U.S. App.D.C. 372, 408 F.2d 175 (1969) has held otherwise in granting the right of intervention under Rule 24(a). The Court of Appeals, sitting *en banc*, carefully considered the three requirements for intervention of right under Rule 24(a)(2). A majority concluded that parents of school children did have a sufficient interest in certain aspects of the action to meet the requirements of the rule; that they were so situated that disposition of the action might, as a practical matter, impair or impede their ability to protect that interest; and that their interest, under the circumstances, was not adequately represented by the Board of Education. *Intervention was allowed.* (408 F.2d at 182).

The above opinions represent a few of the *divided Federal authorities* on the right to intervene. As stated previously, the District Court in refusing to allow petitioners to enter the evidentiary process prevented the Court system from having before it all matters required for judicial determination, (see argument *supra* page 20).

Petitioners are aggrieved because they have not been treated fairly and have not been able to properly represent the class of Anglo-Americans to whom they belong.

In the case of *Mitchel v. Wright et al.*,[16] the appellant sued on behalf of himself and all others similarly situated, for refusal of officials to register him to vote, solely on the ground of his

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[16](C.A. 5th Cir. 1946) 154 F.2d 924, 926, cert denied 329 U.S. 733, 67 S.Ct. 96, 91 L.Ed. 633.

race and color.

The Court, speaking in *Mitchell*, said,

> "If the office of pleading is to inform the Court and the parties of the facts in issue; the Court, that it may declare the law; and the parties, that they may know what to meet by their proof: We think the wrong and injury for which redress is here sought sufficiently appear from the pleading. As in *Lane v. Wilson*, 307 U.S. 268, 59 S.Ct. 872, 83 L.Ed. 1281 (1939) the basis of this action is inequality of treatment under color of law. The fact that the law is fair upon its face is not a defense if it is administered in a discriminatory manner."

Petitioners believe that the United States District Court of Maryland discriminated against Prince George's County Anglo-Americans by denying them the right to put on evidence. The school board's attorney did *not* represent said class and in many ways has jeopardized their constitutional rights, by continually requesting delays at all Court levels.

II

THE FEDERAL DISTRICT COURT AND THE COURT OF APPEALS ERRED IN APPROVING A SCHOOL DESEGREGATION PLAN IN WHICH THE ONLY BASIS FOR ESTABLISHING DESEGREGATION WAS THE REALIGNMENT OF STUDENT ASSIGNMENTS BASED SOLELY ON BLACK-WHITE RATIOS, CONTRARY TO THIS COURT'S HOLDING IN *SWANN V. CHARLOTTE-MECKLENBURG BOARD OF EDUCATION*, 402 U.S.1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971).

The U.S. District Court for the District of Maryland in its order of December 28, 1972 (page 11a) approved a desegregation plan based solely on the number of Blacks being transferred and the number of Whites being transferred, in order to achieve percentages of Blacks and Whites in each school. As directed by the District Court, this method of attaining a unitary school system was based solely on race and for no other

reason. Such method was not within the *Constitutional Commands* of *Brown II.* To accomplish the *court-ordered-racial-ratios,* it has been necessary for the school system to use massive busing. (pages 95a-96a).

Racial balance through massive busing should not be the *only* standard by which Federal Courts desegregate schools, such as Judge Kaufman has done in the case at bar. (See Black-White statistics on pages 93a, 97a, 102a, 103a, 104a).

RACIAL RATIO STANDARD

In realigning student assignments to reach a Black-White ratio within Prince George's County, the United States District Court for the District of Maryland ordered the Prince George's County School Board to implement the *Staff Plan* (Exhibit M page 90a) which is based solely on racial balance and no other standard (See Court Order, page 11a with specific reference to page 32a). This is contrary to the *law of the case* in *Swann.* This Court stated in *Swann,*

> "If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse. (*Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. at 24)"[17]

This Court should note that the only charts included in Judge Kaufman's opinions are found in this one opinion dated December 29, 1972 (Appendix page 11a) and denoted as Charts I (page 18a), II (page 18a) and III (page 19a). These charts refer *only* to (1) number and percentages of students, (2) busing numbers and (3) transfer statistics.

Judge Kaufman ordered on December 29, 1972, to be effective on January 29, 1973, *inter alia,* as follows:

> "The school board is today being ordered, in a separate document to implement the * * * staff plan

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[17] *Wright v. Council of the City of Emporia,* 407 U.S. 451 Justice Burger's dissenting opinion, 451 U.S. at 473.

> **** That Order, in this Court's opinion, is a final Order *as to the issue of student attendance.* Other issues pertaining to faculty, administration, school construction, and legal fees and reimbursable costs * * * are reserved for subsequent determination by this Court." (page 32a) (emphasis added)

Even though *bus transportation* is one *tool of desegregation* which school authorities may be required to use (*Swann*, 402 U.S. at 30), busing for the purpose of achieving racial balance on the sole issue of student attendance is not within the *Constitutional Commands.*

The District Court in the instant case has exceeded all *Constitutional Commands* by ordering, establishing, and approving the *Staff Plan* as follows:

> "The Staff Plan calls for a relatively small number of schools to remain more than 90% White but for none, except for the only two schools in the County which are to be 'paired,' to be more than 50% Black" (page 12a-16a).

The District Court Order skirts the category issue of racial balance in Charts I, II and III referred to above (page 18a-19a) by the following statistical references:

> Chart I – Eligible For Busing – Staff Plan 56.1%
> Chart II – Eligible For Busing – Staff Plan 90,761 students
> Chart III – To Be Transferred – Staff Plan 32,823 students

Within the *Staff Plan* (page 90a) is stated that "This plan affects 188 schools and reassigns 32,823 (16,140 Black – 16,683 White) * * *, of which 12,290 (8,273 Black – 4,017 White) presently walk to school". The *Staff Plan* continues to provide statistics but carefully lists *so many Blacks* and then *so many Whites.* This entire plan is based solely on achieving desegregation by *ratio* of Blacks to White and is unconstitutional, *ipso facto.*

> "The fact that a school board's desegregation plan leaves some disparity in racial balance among

> various schools in the system does not alone make the plan unacceptable. We observed in *Swann* * * *, that 'the constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole' 402 U.S. at 24"[18]

SCHOOL GEOGRAPHIC SECTORS – SCHOOL DISTRICTS

In *United States v. Scotland Neck City Board of Education et al.*, 407 U.S. 484, ____ S.Ct.____, ____ L.Ed. ____ (1972) this Court held that it was immaterial that the dismanteling of a dual school system was initiated by the legislature or by the school board and enjoined the creation of a new school district. Original plaintiff was the United Staes on behalf of Negro children, however, the Court below permitted various Negro children, parents and teachers to intervene as plaintiffs and to permit a three-day hearing before two district judges.

If the State legislature can be enjoined from creating a new school district, how then can a U.S. District Court Order contain specific *school geographic sectors* to achieve a racial balance? Massive busing to achieve Black-White ratios is unconstitutional based upon *school geographic sectors.* (*U.S. v. Scotland Neck Board of Education*, supra) In *Wright*, page 27, supra, this Court held in a 5-4 decision that establishing new school boundaries must not be resolved in terms of the dominant purpose of the boundary realignment (at 461) and that courts will be guided not by motivation or purpose of the officials, but by the effect of their action upon the dismantling of the dual school systems involved (at 462).

The law of the case in *Wright* (5-4 decision) is stated in one sentence,

> "We hold only that a new school district may not be created where its effect would be to impede the process of dismantling a dual system" (at 470).

The dissenting opinion in *Wright* written by Chief Justice Burger and joined by Justices Blackmun, Powell, and Rehnquist included reference to a *standard* established by this court.

[18] Id. at 464.

> "By accepting the District Court's conclusion that Emporia's operation of its own schools would 'impede the dismantling of the dual system,' the Court necessarily implies that the result of the severance would be something less than unitary schools, and that segregated education would persist in some measure in the classrooms of the Grennsville County Area. *The Court does not articulate the standard by which it reaches this conclusion,* and its result far exceeds the contemplation of *Brown v. Board of Education,* 374 U.S. 483 (1954) and all succeeding cases, including *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971) (Emphasis added)

School districts have in the past been designated by State and local governments and not by the courts. This has been based primarily on community school standards.

School geographic sectors are being defined by Federal courts. By court orders which institute desegregation, courts are jerrymandering areas based on racial-ratios, which violate the State and local government school districts.

Petitioners are uneasily aware that this Court's classifications of school districts are potentially synonomous with school geographic sectors within a given school area, and we believe such classified denotations exceed the Constitutional Commands of *Brown II.* In *School Board City of Richmond* v. *State Board of Education* (October term 1972, No. 72-549) oral argument is scheduled for April 23, 24, 1972, a week after filing this petition. This Court's decision may resolve this conflict.

On July 25, 1972, the Honorable Judge Kaufman wrote in his opinion (pps 67a-68a):

> "At the present time, the Prince George's County School System has a total enrollment of 162,828 pupils of which 22.4% are Black and 77.6% are White. Sixty-one percent of the Black attended schools with student bodies greater than 50% Black and 40% of the Black pupils attend schools which are greater than 80% Black. Forty-seven percent of the

> White students attend schools which are greater than 95% White and 66% attend schools which are greater than 90% White."

This was the beginning of establishing race ratios for desegregation purposes, notwithstanding Judge Kaufman's reference to *Wright* in his Memorandum Opinion dated December 13, 1972 (p. 41a), for which the court, although referencing *Wright*, failed to apply any legal rationale.

Recent decisions by the United States Court of Appeals for the Fourth Circuit have not squarely faced the substantial federal questions raised by your petitioners; however, the law developed by the Fourth Circuit and this Court affects many citizens throughout the United States as well as Prince George's County.

The District Court for the District of Maryland in this case did not address the constitutional rights of the petitioners as intervenors. Complete due process of law was violated by Judge Kaufman in denying the introduction of evidence into the record, rather than applying racial ratio statistics. Certiorari must be granted in order to correct the previous constitutional violation, which *inter alia*, is the procedural due process rights of petitioners as a class of Anglo-Americans. The denial of procedural due process has also denied substantive due process rights. The Federal District Court Orders (pp. 11a, 33a, 52a 64a, 65a, 72a) are inconclusive in not recognizing or discussing the distinction of these constitutional rights to include substantive due process[19] along with the procedural due process[20] which the petitioners believe are properly before this Court for determination.

Amendment V of the Constitution of the United States states:

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[19] *Chicago, Milwaukee & St. Paul Ry. Co. v. Minnesota*, 134 U.S. 418, 458 10 S.Ct. 462, 33 L.Ed. 970 (1890); see Paulsen, *The Persistence of Substantive Due Process in the States*, 34 Minn.L.Rev. 91 (1950).

[20] *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 US 123, 179, 71 S.Ct. 624, 95 L.Ed. 817 (1951).

> "No person shall be * * * deprived of life, liberty or property, without due process of law * * * * *"

This distinction of substantive and procedural due process relates to not having an opportunity for petitioners to place into the record, statistics on changing housing patterns, etc. critical to the case at bar, and failure to have such evidence and testimony is a violation of procedural due process. The failure of the District court to learn of the substantive issues that would have been presented during evidentiary hearings was arbitrary and in violation of petitioner's substantive due process rights. See p. 9, *supra.*

In *Joint Anti-Fascist Refugee Committee v. McGrath* (at 179) Mr. Justice Douglas in his concurring opinion stated,

> "It is not without significance that most of the provisions of the bill of rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law."

Due process requirements apply to class actions, *Arey v. Providence Hospital* (D.C.D.C. 1972) 55 F.R.D. 62.

Mr. Chief Justice Warren stated in *Bolling,*

> "Segregation in public education is not reasonably related to any proper governmental objective, and thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the due process clause."[21]

The Court in referring to the due process clause, brought Federal control under the Fifth Amendment of the United States Constitution. The Court went on to say,

> " * * * the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive."

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[21] *Bolling v. Sharpe,* 347 U.S.497, 500, 74 S.Ct. 693, 98 L.Ed. 884 (1954). This case was decided simultaneously with *Brown I.*

Petitioners believe that due process of law is a fundamental Constitutional right in all school desegregation cases.

III

THE FEDERAL DISTRICT COURT AND THE COURT OF APPEALS ERRED IN FINDING THAT THE PRINCE GEORGE'S COUNTY SCHOOL BOARD HAD NOT MET THE CONSTITUTIONAL REQUIREMENTS OF DESEGREGATION WHEREAS THE MARYLAND COURT OF APPEALS HAD PREVIOUSLY DECIDED THAT IT HAD MET THE CONSTITUTIONAL REQUIREMENTS.

On May 15, 1972, the Maryland Court of Appeals issued its decision in *Borders et al, v. Board of Education of Prince George's County et al,* 265 Md. 448, 290 A.2d 510 (1972). The Court of Appeals of Maryland found that in dealing with the school system of Prince George's County, *de facto* segregation rather than *de jure* segregation prevailed,

> "Although it may be argued that *Swann* represents a case wherein *de jure* segregation existed in the school system which was brought about as a direct result of state action, whereas, by contrast, in the present case *de facto* segregation prevailed * * * * * " (at 516)

Borders involved a question of the constitutionality of the Prince George's County School Board's resolution of November 11, 1969, adopting a plan for desegregation of its school system. (See p. 9, *supra*) That plan was the one that was in existence and had been approved by H.E.W. as placing the Prince George's County school system in full compliance with the Civil Rights Act of 1964. The Federal District Court, on the other hand, by its order of July 25, 1972 (p. 64a) found the school system to be in violation of the mandates of the constition as enunciated by this Court.

The conflicting decisions between the Maryland Court of Appeals and the United States District Court for the District of Maryland require this Court to exercise its discretion and grant certiorari. This Court in *Plumbers' Union v. Door County*, 359 U.S. 354, 359, 79 S.Ct. 844, 3 L.Ed.2d 872, 876 (1959) held:

> "* * * by claiming that a political subdivision must be expressly included in a statute if it is to be considered within the law's coverage and that essential state functions will be impaired if the county is subjected to N.L.R.B. coverage. But this Court has many times held that *government bodies* not expressly included in a federal statute may, nevertheless, be subject to the law. (See, e.g., *Ohio v. Helvering*, 292 U.S. 360, 370-371). And Board (N.L.R.B.) jurisdiction to grant relief, far from interfering with county functions, serves to safeguard the interests of such political subdivisions." (at 359).

Prince George's County functions as part of the State of Maryland, being a political subdivision, and the School Board has jurisdiction by statute (Maryland) over the educational system for the county. As such any decision made by the school board such as approving and implementing the school desegration plan of November 11, 1969 was constitutional and the challenge to the school board's authority must come first within the State court system, which produced the *Borders* decision. A federal district court is not within the appellate route for overturning a State court decision. Therefore the conflicting decisions of the Maryland Court of Appeals in *Borders* and the United States District Court for the District of Maryland in *Vaughns*, which is the instant case, regarding the *de facto-de jure* status of the Prince George's County school system is properly before this Court for judicial review.

Prior to *Brown I*, Prince George's County operated a dual school system. Thereafter, the School Board with the aid of H.E.W. sought to correct its system and to comply with the mandates of the law. Proposals and suggestions were tendered by H.E.W. throughout those years. Thus, the unlawful dual school system was effectively dismantled and a lawful unitary system instituted by at least November 11, 1969, when the School Board adopted and implemented the existing desegregation plan. The mandates of *Brown I*, *Brown II*, and *Swann* were thereby enforced. *Borders*, page 33, *supra* provided that the Board of Education was performing its function and that the school was *de facto* segregated.

The District Court's decision on the constitutional issue is considerably devoid of any analysis of the facts and issues involved. Thus, although the lower Court acknowledged changing housing patterns, it made no attempt whatsoever to determine whether or not the alleged racial imbalance in a limited number of schools resulted from such changing housing patterns. The Court, in essence, concluded that if racial balance is not proportionate throughout the entire school system, whatever the cause, that system does not comply with constitutional standards. Such reasoning lacks merit since " . . . neighborhood school plans, when impartially maintained and administered, do not violate constitutional rights even though the result of such plans is racial imbalance. . . ."[22]

The U.S. District Court for the District of Colorado succinctly set forth the difference between *de jure* and *de facto* segregation when it stated,[23]

> . . . From the cases, we gleaned the following principles as essentials of *de jure* segregation:
>
> (1) The State, or more specifically, the school administration, must have taken some action with a purpose to segregate;

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[22] *Keyes v. School District No. One, Denver, Colorado, et al.*, 313 F.Supp. 61 (1970); modified, (CA 10th Cir. 1971), *445 F.2d 990, 999*, certiorari granted, 404 U.S. 1036; argued Oct. 12, 1972, no decision.

[23] 313 F.Supp. 73,74.

(2) This action must have in fact created or aggravated segregation at the school or schools in question.

(3) A current condition of segregation must exist; and,

(4) There must be a casual connection between the acts of the school administration complained of and the current condition of segregation.

The first of the above requirements actually consist of two elements–state action and a purpose to segregate. It seems unnecessary to elaborate on the element of state action at this time, since plaintiffs here emphasize only affirmative official acts.

. . . The important distinguishing factor between *de facto* and *de jure* segregation is the purpose to segregate. See, e.g., *Board of Education of Oklahoma v. Dowell* (CA 10th Cir 1967) 375 F.2d 158, cert. denied. 387 U.S. 931, 87 S.Ct. 2054, 18 L.Ed.2d 993 (1967); *Downs v. Board of Education of Kansas City* (CA 10th Cir. 1964) 336 F.2d 988, cert. denied, 380 U.S. 914, 85 S.Ct. 898, 13 L.Ed2d 800 (1965). . .

In its July 25, 1972 order (p. 64a) the District Court was content with a bare bones factual stipulation. It made no finding as to the motivation of the Board when it enacted the plan then in effect nor of the causation of the alleged racial imbalance in a very limited number of schools. The District Court was content merely to rule on the abstract factual presentation. Based upon the issuance of its restrictive order granting these petitioners' intervention the Court was not disposed toward the development of a proper and complete evidentiary record on the *de jure-de facto* issue. Thus, among other things, the Court did ignore both the Maryland Court of Appeals decision and H.E.W.'s findings of full compliance with constitutional standards.

Basic to the implementation of any plan is the sustainability, upon review, of the District Court's order of *de jure* segregation. Implementation of the *Staff Plan* occurred on

January 29, 1973. If judicial review by this Court does not happen there will be no finding of error by the District Court's *de jure* conclusion. Peitioner's civil rights have been violated in that they have been assigned and transported by edict of a Federal District Court to schools based on the color of their skin for the purpose of achieving a racial balance in a *de facto* school system. January 29, 1973 was the date massive busing began.

As a consequence, this Court should remand the proceeding with directions to reopen the constitutional issue and permit petitioners and all other parties to present evidence on the issue of *de facto* and *de jure* segregation. Otherwise, these petitioners will be denied due process of law.

IV

THE FEDERAL DISTRICT COURT AND THE COURT OF APPEALS ERRED IN REFUSING TO CONSTRUE AND/OR DECIDE THE CONSTITUTIONALITY OF TITLE VIII OF PUBLIC LAW NO. 92-318, §803 OF THE HIGHER EDUCATION ACT AMENDMENTS OF 1972, INCLUDING THE MORATORIUM ON BUSING. IN ADDITION THE DISTRICT COURT DID NOT FOLLOW THE LAW IN §§804, 805 AND 806, IN VIOLATION OF THE CONSTITUTION AND THE LAWS OF CONGRESS.

On June 8, 1972, Congress enacted Public Law No. 92-318, Title VIII, § 801 et seq, (pp. 5-7 *supra*), 86 Stat. 235, a set of provisions attached to the Higher Education Act offering some degree of legislative relief from the recent escalation of court-ordered transportation of students for purposes of achieving desegregation.

The Act contained a measure aimed at Department of Health, Education & Welfare administration which prohibits the use of federal funds for busing unless voluntarily requested by local officials, and, under any circumstances, where the time or distance of travel is so great as to risk the health of the children or significantly impinge on the educational process, or where the educational opportunities available at the school to which

the pupil will be bused will be substantially inferior to those where he would otherwise be assigned. A complementary provision forbids federal officials from requiring the expenditure of state or local money for busing, or from conditioning the receipt of federal funds upon the implementation of busing, both with the same qualifications as to voluntary local request, time or distance, and inferior opportunities.

Directed more specifically at the judiciary is a moratorium on the implementation of any new or pending United States district court order to bus until all appeals to such order have been exhausted, or until January 1, 1974. (§803, p. 5, *supra*) In addition, there is an authorization to parents of students transported under finalized court orders to seek intervention or reopening of such orders if the time or distance would impair health or impinge on the educational process (§ 804, p. 6, *supra*). A section establishing national uniformity in the application of rules of evidence required to prove discrimination, and in the application of desegration orders was added (§ 805, p. 6, *supra*).

Petitioners in their Memorandum of Law dated August 23, 1972 (Exhibit L, p. 78a,) cited §803 at p. 83a and §804 at p. 87a to inform the court below of the federal statute.

Judge Frank A Kaufman in his Memorandum Opinion and Order dated August 31, 1972 stated,

> "In connection therewith, this Court notes that since it is not hereby ordering for implementation at this time any action by defendants which requires the transfer or transportation of any student or students from any school attendance area prescribed by competent state or local authorities for the purposes of achieving a balance among students with respect to race, sex, religion, or socioeconomic status' as provided in section 803 of the Higher Education Act Amendments of 1972, Pub.L. 92-318, this Court is required neither to postpone the effective date of its within Order as proceeded thereby, nor to construe that section, nor to consider its constitutionality, the

latter question having been reserved by counsel for plaintiff's herein." (p. 62a)

In the District Court's Memorandum of December 13, 1972 (pp. 33a *et seq*), the above was not referred to, but for footnote 26 on the subject of stay (p. 44a). In the District Court's Opinion of December 29, 1972, Pub.L. 92-318 was not referred to (pp. 11a-32a). The record is absent any written documentation by the District Court referencing Pub.L. 92-318 §803 except as noted above. In addition the Court completely ignores the other sections to wit: §§804, 805, 806.

Your petitioners maintain that Pub.L. 92-318 is a law that should and must govern the Federal District Court actions and decisions, and Judge Kaufman violated this law, unless this Court in the case at bar, holds that Pub.L. 92-318 §801 et. seq. is unconstitutional.

This statute constitutes a congressional embarkation on a path of independent policy-making in a direction contrary to the legal position of Judge Kaufman's Order of December 29, 1972 and his previous orders. There appears to be present grave constitutional implications as to the separation of powers between the three governmental branches,[24] specifically in respect to the Broomfield amendment,[25] establishing the moratorium on district court orders. There can be little doubt, however, that as a result of the power conferred upon Congress in Section Five of the Fourteenth Amendment[26] and

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[24] *O'Malley v. United States*, 314 U.S. 574 (1971), *Massachusetts v. Mellon*, 262 U.S. 477 (1923).

[25] Student Transportation Moratorium Act of 1972, Pub.L. No. 92-318, Title VIII §803 (June 23, 1972).

[26] U.S. Const. Amend. XIV §5, "The *Congress* shall have the power to enforce, by appropriate legislation, the provisions of this article." (emphasis added)

more pointedly in Section II of Article III,[27] wherein Congress is empowered to develop comprehensive national policy legislation,[28] it has the power to declare a suspension on the use of remedies by the federal courts (at least temporarily) in order to engage in the enactment of such legislation.

Although there exists, of course, no precedent in precisely this type of situation, Congress has dealt with the question of remedy in the courts since 1793, in one way or another,[29] and there appears to be ample authority for the invocation of this legislative power. It is most significant that what is being denied by Section 803 is the use of one particular equity remedy: there is no implication of a legislative reversal of the basic finding of segregated educational facilities as unconstitutional.[30] [*See Busing Moratorium—An Analysis*, 2 U.Balt.L.Rev. 125 (1972)]

This Court in its *Drummond* decision[31] of September 1, 1972 (by Mr. Justice Powell) ruled that Congress, through its employment of the phrase "A balance among students with respect to race" in section 803, intended to suspend the use of busing only when the goal was "racial balance," which is synonymous with eliminating *de facto* segregation. This was the situation in Prince George's County at the time of Judge Kaufman's Order on December 29, 1972 and to thwart the laws of Congress by the judiciary on the terms of *de facto* and *de jure* segregation should not be allowed.

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[27] U.S. Const. Art. III §II, "In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, *with such Exceptions*, and under such Regulations *as the Congress shall make.*" (emphasis added)

[28] H.R.13,915, 92d Cong., 2d Sess. (1972).

[29] *Commissioner v. Estate of Bedford*, 325 U.S. 283 (1945); *National Exchange Bank v. Peters*, 144 U.S. 570 (1892); The Francis Wright, 105 U.S. 381 (1882); *Ex Parte* Vallandingham, 68 U.S. (1 Wall.) 243 (1864).

[30] *Brown v. Board of Education*, 347 U.S. 483 (1954).

[31] *Drummond et al. v. Acree et al.*, 41 U.S.L.W. 2123 (U.S. No. A-250 Sept. 1, 1972). The opinion noted, however, that the prohibition on use of federal funds would remain valid in all cases because Congress had included the term "desegregation" in the Student Transportation Moratorium Act of 1972, Pub.L.No. 92-318, Title VIII, §802(a) (June 23, 1972).

Reference petitioners argument at p. 33, *supra* on the Maryland Court of Appeals holding in *Borders*.

Section 806 of Public Law 92-318 (p. 6, *supra*) addresses the exact problem in the instant case and Judge Kaufman in violation of this new Congressional enactment issued his Order of December 29, 1972 to be effective on January 29, 1973 (p 11a). The busing provision of Section 407(a) of the Civil Rights Act of 1964 is prohibitive legislation designed to restrict the federal court system. The extension to all geographical areas by Section 806 of Public Law 92-318 is to promote uniformity in the legal process and applies equally to the United States District Court for the District of Maryland as to any other. Judge Kaufman failed to recognize and failed to accept this Congressional mandate.

CONCLUSION

For the reasons set out in this petition, this Court should grant the writ of certiorari, and set the case down for briefing and argument on the merits.

Respectfully submitted,

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